In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 274

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
PETITIONER,

v.

WHITAKER HOUSE COOPERATIVE, INC., *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Petitioner's brief properly set forth the opinions below, the jurisdiction of the Supreme Court, and the pertinent statute and regulations involved in this litigation.

Question Presented

Are member-patrons of a true cooperative (i.e. Whitaker House Cooperative, Inc.) employees of themselves under the Fair Labor Standards Act?

Statement

The opinion of the District Court (Petitioner's Record Appendix 78-99, officially reported at 170 F. Supp. 743) contains a fair statement of the facts. (See pages 80 to 91 of the Petitioner's Record Appendix.) However, some aspects of the operation of the Cooperative are omitted, therefore, a short statement is included here for the benefit of the Court.

In the spring of 1957 a group of about fifty women from the central portion of Maine between the ages of thirty-five and eight-five gathered together for the purpose of organizing an association which would enable them to market the products of their hand work. These women for the most part came from what would ordinarily be considered rural areas and would be classified as skilled artists in the making of crocheted and knitted outer wear primarily for infants. Many of these women in conjunction with their husbands own their own homes, made these items in their spare time and for the most part in their own homes with materials such as wool and nylon yarn and knitting needles or crochet hooks supplied by themselves. Most of these women had been making these items for many years, in some cases as much as fifty years.

On July 9, 1957 some thirty of them met as a group at the Jefferson Hotel in Waterville, Maine, for the purpose of organizing themselves. At this meeting they determined to organize into an incorporated cooperative which they named Whitaker House Cooperative, Inc. The purposes of the corporation which was to be established by them was:

> "1. To manufacture, sell, and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making

and selling knitted, crocheted, or embroidered clothing either at wholesale or retail.

2. To purchase, lease, or otherwise acquire and to hold, use, manufacture, or otherwise dispose of any materials and products which may be involved in the carrying on of the aforementioned business.

3. To do any and all lawful acts and things necessary, pertaining, convenient, or incidental to the foregoing purposes or any part thereof tending to increase the value, usefulness, comfort, or convenience of the property or any part thereof at any time held by said corporation, and to have or exercise all the rights, powers, and privileges appertaining to corporations of a similar nature organized and existing under the laws of the State of Maine; but not, however, to have or exercise any right, power, or privilege for any purpose for which corporations are not permitted to be formed under the General Laws of the State of Maine as provided in Section 1 to 24 both inclusive, of Chapter 56 of the Revised Statutes of Maine, 1954, and acts amendatory thereof or additional thereto." (Whitaker House Cooperative, Inc. charter.)

At this meeting by-laws were read to the assembled group and passed upon after appropriate amendments or changes were made and then finally adopted by those present. The women then elected a Board of Directors from amongst their own group and also officers. Thereafter the organization of the cooperative corporation was completed as of July 18, 1957. The directors then met and hired as general manager one Evelyn M. Whitaker, a person known to the membership and directors at that time as being one who had a great deal of experience in the merchandising of the particular type of articles which these women made and whom they felt to have all the qualifications necessary to

fulfill the position as general manager. The Board of Directors also in behalf of the cooperative agreed to purchase an inventory of articles which the same Mrs. Whitaker had in her possession.

Thereafter the Board of Directors held monthly meetings. This required a certain amount of personal expense to each of them inasmuch as they had to travel distances of thirty to seventy miles, as far away as Lincoln, Maine and Waterville, Maine, to attend these meetings for which they received no compensation At these meetings the business operations of the cooperative were reported to the Directors, financial reports were submitted and general problems of business policy resolved by the Board of Directors.

Soon after the cooperative started business it became swamped with applications for membership and orders from stores all over the country. It became apparent that Mrs. Whitaker could not perform the functions satisfactorily of both general manager and treasurer. She resigned as treasurer and the Board of Directors filled this vacancy by electing the Chairman of the Board of Directors, Mrs. Ella Mae Banton, as treasurer. In the case of both persons who held this position, they were required by the Directors to be bonded in the amount of $2,000.

About two hundred women finally joined the cooperative. One hundred sixty of which were from Maine and approximately forty were from outside the State of Maine. A person desiring to become a member of the cooperative would make inquiries of any of the officers or the Board of Directors, whereupon they would be sent a copy of the by-laws and an application blank. They were required to submit a sample of their knitting to the home office and to pay a membership fee of $3.00. Upon receipt of the sample from a prospective member and the application blank properly executed by the applicant, Mrs. Whitaker as general

manager would either approve or disapprove the application. If the application was disapproved, the applicant had the right to appeal to the Board of Directors. All of the members have paid their respective membership fee and no knitted or crocheted products are sold for any one other than members. In other words the cooperative acts as a selling agent only for its members.

In October of 1957 a special meeting of the members was held at the Grange Hall in Troy, Maine where the Directors, officers and about forty members were in attendance. At this meeting reports of the business operation of the cooperative were given and the financial statement read to the members.

During the succeeding months financial problems arose which required the cooperative to obtain a bank loan in the amount of $5,000 in the spring of 1958 which was used as operating capital. The cooperative gave its note to the lending bank. This note was personally endorsed by three of the directors and the vice-president, Mr. Jack Kennedy, who receives no salary or other compensation. In June of 1958, the annual membership meeting was held at Bangor, Maine, where again a report was given to the members by the cooperative's accountant, Francis Jacobs. At this meeting the members voted to amend certain of the by-laws and also voted to require an annual membership fee of $3.00 and that payments to the membership be made every other month. A motion made at the June meeting to establish a cash reserve for the purpose of paying off back indebtedness was tabled.

It is interesting to note that at the first meeting of the associates in Waterville, Maine, the members voted to do certain things which were contrary to the advice of counsel then present. They adopted the name Whitaker House Cooperative, Inc. for example (DR 38).* They also voted

* Respondents' record appendix is referred to as DR—herein.

to change the proposed purposes which proposal would have limited them to making babies or infant's wear to the unlimited proposal finally adopted (DR 38). They also voted to establish a fifty-one per cent quorum requirement which has subsequently created no little difficulty.

The evidence reveals that the operating method of the cooperative can be briefly summarized as follows: A member makes any number of articles she desires and sends or takes them to the main office of the cooperative in Troy, Maine, whereupon a slip is made out in duplicate under the members name listing the articles submitted, the number and the amount of the advance allowance which the cooperative will pay to her whenever the items are sold by the cooperative. The articles then submitted are trimmed, tagged, boxed and shipped by employees of the cooperative who are paid a dollar an hour. Experience since the cooperative started shows that the inventory turnover takes about three months and that the members do not receive their advance allowance for several months after they are sent in to the cooperative.

The amounts which are paid to each member for goods (DR 39) submitted are determined by the Board of Directors after deducting the anticipated cost of overhead and sales. The directors attempt to divide the price charged to the retail stores so that twenty per cent will go to the sales force, twenty per cent for all other expenses and sixty per cent will go to the members. In actual practice the amount received by the members has equaled approximately fifty-seven per cent.

The cooperative has a sales agent who, as described above, receives a twenty per cent sales commission. The orders obtained by the sales force from the cooperative's retail customers come directly to the cooperative where the general manager prepares the order for shipment, ships them directly to the retail store and bills are sent by her

directly to the retail store which again in return pays directly to the home office of the cooperative.

Members often call the home office of the cooperative in order to find out what items have been ordered in order that they may make things which they can expect to sell promptly through the cooperative. The designs or styles of the various items are made up by various members of the cooperative.

In the operation of the cooperative, which was organized as a non-profit organization, no one receives any profits from the sale of merchandise by the cooperative. There is no return on capital investment and the only entrepreneur profit that could be available would be the amounts which the members would receive in the event that excess receipts were distributed after the payment of sales and overhead expenses.[1]

On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative, and held that it did not "suffer or permit" its producing-members to work, within the meaning of the Act. The basis of the holding is *completely* clear as the Circuit Court said in its opinion, (275 F. 2d at 363) "The parts of the record cited to us do not establish that the district court was clearly

[1] Events which have occurred since the day of the trial demonstrate even more fully the control of the cooperative by the members. They have cut costs by eliminating the salary of the president, discharging the accountant, cutting commissions to the sales force and by changing the method of packaging. They increased their income by raising the prices charged to the stores. On May 6, 1960 the home office of the cooperative was burned which resulted in a $6,000 loss over and above the insurance carried on the inventory. This $6,000 loss was not borne by Mrs. Whitaker, the president or the corporate entity known as the cooperative but by each individual member in proportion to her share of ownership in the entire inventory. All of this was done as a result of their own voting. These facts are recited to rebut the petitioner's claims on pages 12-13 of their brief, concerning the financial distress of the cooperative. The respondents contend this is irrelevant to the main issue.

erroneous in its finding that the cooperative was a bona fide cooperative controlled by the member producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a bona fide cooperative with control by the member-producers." (See also Petitioner's Appendix A, Page 35.)

Reasons For Not Granting The Writ

1. The Supreme Court Has Previously Rendered a Decision Involving the Present Issue in Favor of the Respondents.

This court denied the petition for writ of certiorari of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor against Plymouth Manufacturing Corporation *Walling* v. *Plymouth Manufacturing Corporation*, 139 F. 2d 178 (7th Cir. 1943 cert, denied 322 U. S. 741 (1944)), and therefore has already considered the situation where, if work done by a partner of a partnership is rendered as a partner for the partnership and not as an employee of the partnership then the Act does not apply. A cooperative is often defined as an incorporated variation of a partnership. Even though the court in the *Walling* v. *Plymouth* case did not rule upon the exact issue as to whether partners are employees of a partnership, it is significant that no later cases are reported involving this same partnership or any other partnership

on this issue. It is perhaps even more significant that there does not seem to have been any great flood of partnerships in a wave of attempts by businesses to avoid the application of the Act in the wake of this case.

There is no likelihood that the country will be flooded with bona fide cooperatives to avoid the provisions of the Fair Labor Standards Act. Why, because it involves too much work with no entrepreneur profit. A businessman who might attempt it would soon find that he could not make a profit himself if he organizes a bona fide cooperative. If it is a "front" type cooperative then the Act would apply as it has for the last twenty-two years. The fact that the Act has been in effect this long without any true cooperatives being organized to avoid its application speaks louder than any argument the petitioner can put forth that the cooperative affords an easy means of vitiating the effect of the Act.

2. Decisions Below Have Not Altered Established Law.

The decision of the court below has in no way altered or changed the authority of prior rulings of this court or any other court as far as the meaning or the scope of the Fair Labor Standards Act in its coverage of homeworkers is concerned. Indeed, the District Court below had shortly before the hearing in the instant case rendered a decision which followed all of the previous rulings involving homeworkers. (*Mitchell* v. *Nutter* 161 F. Supp. 709, D. Maine.) This decision reviewed completely the long line of decisions involving the Act's coverage of homeworkers. It would be inconceivable that the court below should render a decision shortly aftewards which would change any of the effect of the prior ruling.

The court below examined the congressional history of the Act and found it "unenlightening. Specific Congres-

sional reference to cooperatives, in context, are directed solely to the applicability of the Act to persons who are "employees" of a cooperative in the sense concluded by *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755 (170 F. Supp. 743);" (R 96)

It is significant that the Court of Appeals involved here is the same court which rendered the opinion upon which the petitioner has so heavily relied throughout these entire proceedings, namely, *Fleming* v. *Palmer*, 123 F. 2d, 749 (1st Cir. 1941), cert. denied, sub nom., *Caribbean Embroidery Cooperative, Inc.* v. *Fleming*, 316 U. S. 662 (1942).

The Court of Appeals below distinguished its previous decision in Palmer on the grounds that the former decision did not involve " . . . a bona fide cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers." *Mitchell* v. *Whitaker House Coop. Inc.*, 275 F. 2d at 363.

The Court of Appeals also distinguished *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (4 Cir.), cert. denied 338 U. S. 900 (1949), and stated that "the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account." *Mitchell* v. *Whitaker Coop. Inc.*, supra. *McComb* v. *Homeworkers' Handicraft Corp.* was another case upon which the petitioner heavily relied in the courts below. The petitioner gains nothing by alleging that the court below did not consider these decisions, for it is quite apparent from the reading of both opinions below that the courts were very concerned about the importance of this litigation and were extremely careful

in their appraisal of the situation presented to them by this case.

Brandeis, J. long ago in *Liggett Co.* v. *Lee*, 288 U. S. 517, Page 579, stated, "Americans have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts—."

Let us look at a couple of hypothetical situations. There are a number of individual boat builders in Maine, highly skilled in their craft who make a wide variety of boats in about every price range. Let us assume that some of them realize that as individuals they are unable to compete with large mail order and wholesale concerns in the better market areas because as individuals they cannot afford to hire sales representatives nor can they as individuals meet the volume requirements of modern, metropolitan merchandising methods. These craftsmen then decide to establish a cooperative of boat builders which will provide them with a centralized office and display room and will provide a sales force for them. The individual boat builders send their boats in to the display room to be sold. The cooperative itself does not buy the boat. Query? Are these boat builders employees of their own cooperative? Even the petitioner should agree there is no employment relationship here. The petitioner would argue, of course, that the large investment of each builder in his tools and equipment together with other differences would enable them to avoid application of the Act.

Let us, then, take another example. Forget for the moment that those engaged in farming are exempt from the Act. Let us assume that a group of one hundred small potato share-croping farmers get fed up with losing the middleman's profit on the sale of their potatoes. They organize a potato marketing cooperative. Let us also assume that they do not own the land on which their crops grow and they rent the equipment used to grow their crops. They elect four from among themselves to supervise the grading, packaging, storage and sale of potatoes and these four hire a professional potato wholesale manager. Can it be said that these farmers are employees of their own marketing cooperative?

The immediate reaction is, of course, they are not employees. This hypothetical situation is a far cry from the organization established in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755 (1949) where the farmers hired others to do the work for which their cooperative had been established. The warehouse workers and manager of our hypothetical case would be the type to be covered under the Farmers Reservoir decision.

3. Legislative History Not Significant

The respondents agree that the legislative history reveals many unsuccessful attempts to exempt homeworkers from the provisions of the Act. Respondents have not, do not and will not advocate exempting homeworkers from the provisions of the Act. However, the Act only applies to homeworkers who *are in fact employees*. The members of Whitaker House Cooperative say that they are not employees and do not need or want the protection of the Act. As the District Court said (R. 98) . . . "it is difficult to see how the homeworkers here involved require the protection of the Act, or that the Act should be applied to them. The

evidence discloses a marketing cooperative organized and operated by these ladies for the purpose of permitting them to sell to better advantage the products of their handicraft. In essence, the Cooperative exists to render services to its members; it receives the products produced by its members, sells the products for its members and distributes the net proceeds to its members as the articles submitted by them are sold. The record shows that the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear, and that they are so engaged for their own mutual benefit, and not as employees and employed by anyone. Their interests, as members and producers are identical. The work they perform is performed by them as members of the Cooperative, and not as its employees. Cf. *Walling* v. *Plymouth Mfg. Corp.*, 139 F. 2d 178 (7th Cir. 1943, cert. denied, 322 U. S. 741 (1944)).

"The "economic reality" of the instant situation compels the conclusion that while these ladies work to produce their products, they do not work for the Cooperative, and neither does the Cooperative "suffer or permit" them to work. It has no connection with their labors. Rather, they, collectively, "suffer or permit" themselves individually to work. If the Fair Labor Standards Act be strained to recognize an employment relationship in these circumstances, such relationship can only be between these women as members and the same women as homeworkers. The Congress may wish in its legislative wisdom to declare that they so employ themselves. But in the opinion of this Court, the Act as written does not now so provide. This Court will not judicially legislate, whether it be urged to do so by homeworkers as in Mitchell v. Nutter, supra, or as here, by the Department of Labor."

Conclusion

The way of industrial democracy, i.e. through cooperative organization, must not be closed by the indirect device of designating member-owners of a true cooperative employees of themselves under the Fair Labor Standards Act.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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